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[APPELLATE CRIMINAL JURISDICTION]

McELWAINE, C.J., AITKEN, Ag. J.A.

& MANNING, J.

April 17, 1941.

LOW CHENG SWEE vs. REX.

[SINGAPORE MAGISTRATE'S APPEAL

No. 100 of 1940]

Penal Code S. 420—Insurance—A person insuring a car with two Insurance Companies—Whether non-disclosure to either of them can be deemed to be dishonest.

An accused was charged with cheating under S. 420 of the Penal Code by dishonestly insuring his motor car with two insurance companies without disclosing to either of such companies the fact that he had insured it with another Company and by receiving from both companies moneys under the two policies.

Held, (on appeal) that before non-disclosure can be deemed to be dishonest it must be shewn that the accused knew that each company's liability would be lessened by the fact which he failed to disclose, and that non-disclosure would deceive and induce the company to act to its detriment. Such knowledge had not been proved and could not be assumed in a criminal case. No legal presumption arose that the accused had read and was acquainted with the conditions of the policy of assurance and there was no sufficient evidence of cheating.

MAGISTRATE'S APPEAL.

V. J. Mendis for appellant.

T. D. Wallace (Crown Counsel) for the Crown.

The judgments of the Court of Appeal (consisting of McElwaine, C.J., Aitken, Ag. J.A. and Manning, J.) was delivered by the Chief Justice.

McElwaine, C.J.—The appellant was tried on the following charges:—

(1) That he on or about the 21st day of November, 1939, at Singapore, by dishonestly concealing from the Asia Insurance Co., Ltd., that he had insured his car, J. 6658, with the Commercial Union Assurance Co., deceived the said Asia Insurance Co., Ltd., and thereby dishonestly induced the said Company to deliver to him certain property, namely cash $220, and he thereby committed an offence punishable under section 420 of the Penal Code.

(2) That he on or about the 22nd day of November, 1939, at Singapore, by dishonestly concealing from the Commercial Union Assurance Co., Ltd., that he had insured his car J. 6658, with the Asia Insurance Co., Ltd., deceived the said Commercial Union Assurance Co., Ltd., and thereby dishonestly induced the said Company to deliver to one Boey Nam, the proprietor of the Boey Nam Motor Works, of Hamilton Road, Singapore, certain property, to wit, cash $335.73 and he thereby committed an offence punishable under section 420 of the Penal Code.

He was convicted on the first charge and sentenced to three months rigorous imprisonment. The second charge was then withdrawn.

In 1937 the appellant bought a car on Hire Purchase. The vendor insured the car with the Commercial Union. This insurance was renewed. The appellant completed his payments and was handed by the vendor among other documents the current policy of the Commercial Union. The date of the closing of this transaction is vague but on the whole it appears to have been on 3rd October, 1939.

On the 27th September, 1939, the appellant applied for insurance of the same car with the Asia Insurance Co. On 6th October this Company issued a policy effective as from 27th September. Later in October the car met with an accident, and claims were made against each Insurance Company. On 21st November the Asia Insurance Company paid the appellant $220 and next day the Commercial Union paid Boey Nam, proprietor of Boey Nam repair shop, $335.73 as this man claimed this sum on behalf of the appellant under the Commercial Union policy.

Each policy contained a condition to the effect that if at the time of the occurrence of an accident there should be any other insurance existing covering the same loss or damage, the Company should not be liable to pay or contribute more than a rateable proportion of any loss, damage, compensation, costs or expenses.

In connection with the claim against the Commercial Union a claim form was filled in by the appellant. No question was asked on that form as to whether or not there was any other insurance on this car. In the case of the Asia Insurance Co. no claim form appears to have been filled in. There is no evidence that in making either claim any express representation was made to either Company that there was no other insurance on this car.

The condition in the policies, to which I have referred, was a condition limiting the Company's liability.

Neither Company asked whether there was another policy, so there was no active misrepresentation on the part of the accused. Each Company just assumed that it was the sole insurer without troubling to make the slightest inquiry of the appellant.

The offence of cheating is defined in section 415 of the Penal Code: Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person— is said to cheat. A dishonest concealment of facts is a deception within the meaning of this section.

In making each claim there was a concealment of fact. Was that concealment dishonest? Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing dishonestly. Wrongful gain is gain by unlawful means of property to which the person gaining is not legally entitled.

Dishonesty in the legal sense is, therefore, the doing something with the intent of gaining property by unlawful means, and therefore concealment to be an ingredient of cheating must be done with the intent of gaining property by unlawful means. In other words the concealment itself must be unlawful. "Unlawful" is the English form of "illegal", and a thing is illegal if it furnishes ground for a civil action. Non-disclosure of the second policy possibly furnishes the Asia Insurance Co. with a cause of action to recover part of the $220 as money paid under a mistake of fact. So whether the appellant has committed a crime by his concealment depends entirely upon whether or not he was aware of the condition in the policy limiting the Asia Insurance Company's liability.

There is no sufficient evidence that he was aware of it. Whether an illiterate Chinese would, in a civil action, be bound by conditions in an English contract which he cannot read and which have not been explained to him and of which he is unaware, does not now arise. But in a criminal case I think that before non-disclosure can be deemed to be dishonest it must be shown that the accused knew that the Company's liability would be lessened by the fact which he failed to disclose, and that the non-disclosure would deceive and lead the Company to act to its detriment. I am not disposed to assume any such knowledge in a criminal case, and such knowledge is not proved.

It is true a witness Ho Ah Kim gave evidence that he asked the accused if he had another policy when he applied to the Asia Insurance Co. for a policy on 27th September and that the accused said his former policy had expired. It appears that the Commercial Union policy was not handed to the accused till 3rd October. So whether or not he knew of the existence of this policy when he applied to the Asia Company on 27th September, there is nothing to show that he knew in whose favour it was. The proposal form signed by the accused—if such a form was signed by him—was not produced. It is admitted that it contained no reference to other insurance. Ho Ah Kim swore that if there was an existing policy he would not have insured the accused, though it is apparent from the condition to which I have referred, that there is no rule against dual insurance. Mr. Wallace quite properly did not lay much stress on this man's evidence. There is nothing else to indicate that the accused knew that the liability of the Asia Company was reduced by reason of the Commercial Union policy, and in my opinion the evidence of cheating is insufficient.

The second charge was withdrawn. That was the stronger case because in it there was not only non-disclosure of a fact which reduced Commercial Union's liability under the condition in the policy, but there was in addition a receipt of payment for a loss for which the accused had already been indemnified. That of course would necessitate a consideration of whether the obtaining of indemnity twice for the same loss was an offence under all the circumstances of the case, but that point does not now arise.

I am of opinion that before the accused could be convicted on the charge on which he was convicted, it was incumbent on the prosecution to prove that he knew of the condition and of its effect, or that he made a false statement or gave a false answer to a question asked by the Company. Such knowledge has not been proved, no false statement was made and no false answer was given, and the conviction cannot stand.

The appeal is, therefore, allowed and the conviction set aside.

Aitken, Ag. J.A.—I have had some difficulty in making up my mind about this appeal because I am of opinion that if an assured person, who has insured the same car with two companies, knows that he is not entitled to recover more than the full amount of the damage which the car has suffered, and yet sends in a claim for that amount to each company without notifying either of them of the other policy and thereby succeeds in getting paid twice over, he may very properly be convicted of cheating under Section 420 of the Penal Code.

In this particular case both my learned brethren are satisfied that there was no sufficient evidence before the learned Magistrate to prove that the accused knew that he was only entitled to claim and receive from the Asia Insurance Company a rateable proportion of the damage done to his car. I agree that it is very un-

likely that he can read English, though no evidence that he cannot appears to have been adduced, and it is therefore quite possible that the accused did not know of the relevant condition in either policy. On the other hand the fact that all motor Insurance Policies are, and always have been, indemnity contracts, at any rate so far as they are concerned with damage to the assured's car, is surely widely known amongst all classes of car owners; and it is reasonably clear that the Chinese garage proprietor, who made out the two bills, knew that he was doing something he ought not to be doing. Morever, the accused refrained from offering any explanation of his conduct, either on oath or otherwise, and no evidence was called on his behalf.

In these circumstances it is not surprising that the learned Magistrate came to the conclusion that the accused and the Chinese garage proprietor had plotted together to obtain double compensation. However, there does appear to be an element of doubt as to the charge on which the accused was convicted and sentenced, and as both my learned brethren are clearly of opinion that such element of doubt is substantial enough to be reasonable, I am prepared to fall in with their view and to agree that this appeal should be allowed.

Manning, J.—The decision of this appeal depends on whether the prosecution have proved that the appellant was aware of the provisions of condition 7 in a motor car insurance policy issued by the Asia Insurance Co. The facts were that the appellant signed a form of proposal and paid the premium. A policy was then issued to him. It stated that the proposal was to be the basis of the contract but it contained a number of conditions which had not been mentioned in the proposal form. One of these was condition 7 which was to the effect that if at the time any claim arose under the policy there was any other existing insurance covering the same damage the company should not be liable to pay more than its rateable proportion of such damage. The policy was signed by an agent of the Company. It was not signed by the appellant and it was never intended that it should be signed by him. There is therefore no similarity of principle between this case and cases in which a person alleges that he did not understand the contents of a document which he has signed.

The policy contained on the outside the following notice:—

> "For your own protection you are requested to read this policy in full, including its conditions, and, if it is not in accordance with your intentions, to return it immediately for correction".

The first thing to be noted is that the appellant was not bound to read the policy. He was requested to read it in his own interest. If he did not return it within a reasonable time the company was entitled to assume that he has agreed to its terms. But no presumption arises that he did actually read it, there is an equal probability that that he did not bother to read it and relied on the company's not having inserted any conditions that might be unfair.

The way the notice might operate may be illustrated by the facts of the present case. If the company had been aware of the other insurance, it would have said to the appellant when he presented his bill for repairs, "We are paying only half of this. See condition 7 in the policy". If the appellant had denied all knowledge of this condition the company might reply "We asked you to read the policy for your own protection. If you did not read it, this was due to your own negligence and you are bound by the condition even if you were unaware of it".

On the other hand what actually happened was that the company did not know of the other insurance and paid the appellant's claim in full. The appellant was then prosecuted for cheating. The onus was on the prosecution to show that he was actually aware of condition 7. To show that he ought to have been aware of it or that he was negligent in not being aware of it was not sufficient. No presumption arose that he was aware of it and there was no direct evidence to this effect. It is not impossible that a person may honestly believe that if he has paid two premiums to two different insurance companies he is entitled to be doubly indemnified. The insertion of condition 7 in the policy shows that the company was aware of such a possibility and took occasion to provide against it.

For the above reasons I am in favour of allowing this appeal.

Appeal allowed.

[APPELLATE CIVIL JURISDICTION]

CAREY, J.

January 17, 1941.

CHE DIN SULAIMAN

(Respondent)

vs.

LEE SOON PENG

(Appellant).

[PENANG CIVIL APPEAL No. 4 of 1940]

Oaths Ordinance (Cap. 15) Ss. 7 and 8—Challenge to take oath in special form.